NO. 82-294

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

STATE OF LOUISIANA,
Petitioner

versus

JOSEPH MARSHALL,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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QUESTIONS PRESENTED

WHETHER THE DECISION OF THE SUPREME COURT OF LOUISIANA REVERSING THE DEFENDANT'S CONVICTION AND DEATH SENTENCE FOR FIRST DEGREE MURDER WAS IN ACCORDANCE WITH THE UNITED STATES SUPREME COURT'S DECISION IN HOLLOWAY V. ARKANSAS FOR:

a) Prejudicial conflict of interest by forcing co-defendants in a first degree murder case to be represented by single counsel;

b) the trial court's refusing defendant's pre-trial request for appointment of separate counsel.

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A P P E N D I X

OPINION OF THE LOUISIANA SUPREME COURT ..... "A"

AUTHORITIES CITED

Holloway v. Arkansas, 435 U.S. 475, 55 L.Ed.2d 426, 98 S.Ct. 1173 (1978)

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942)

Cuyler v. Sullivan, 446 U.S. 355, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)

American Bar Association, Ethical Consideration 5-15 of the Code of Professional Responsibility

NLADA BRIEFCASE, Vol. XXXVI, No. 2, Summer 1979, The Holloway Decision, Impact and Implications

OPINIONS BELOW

The Louisiana Supreme Court reversed the conviction for first degree murder and set aside the death sentence which judgement is reported at 414 So.2d 684(La.)and is attached hereto in the appendix.

JURISDICTION

The judgement of the Louisiana Supreme Court rendered on May 17, 1982 became final when the State of Louisiana's Application for Rehearing was summarily denied by the court on June 18, 1982. Jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the defendant's Sixth Amendment right to effective assistance of counsel for his defense and the Fourteenth Amendment's guarantee of due process and equal protection of the laws.

STATEMENT OF THE CASE

Defendant, Joseph Marshall, was convicted of first degree murder, a violation of R.S. 14:30. Following the jury's unanimous recommendation of capital punishment, Marshall, age sixteen (16), was sentenced to death. The co-defendant, Kevin Marshall, plead guilty to manslaughter after the trial of Joseph Marshall.

Three visitors to the city of New Orleans left their hotel intending to walk to a nearby restaurant for dinner. They were walking toward a local housing project just off Canal Street. At that time they encountered two youths who gave them directions. One of the youths pulled a gun and demanded money. Three other youths stood nearby as lookouts while the visitors were being robbed. One of the visitors, Mr. Max Minnig, was shot when he slapped at one of the youths who had a gun. After the first shot misfired, Minnig was shot again. After the shooting, a fur cape was taken from the victim's companion and all five youths ran away.

The police arrested five suspects, Joseph Marshall and Kevin Marshall, and three others who testified for the State at trial. Joseph and Kevin were indicted by the Orleans Parish Grand Jury and the Criminal District Court, Section "J" appointed a single attorney, John M. Lawrence, to represent both defendants.

Four months before trial, Lawrence moved the trial court to appoint separate counsel for each defendant because, among other reasons, "the interest of each defendant with respect to evidence, presentation of testimony, decision to take the stand or not, the presentation of a defense, accountability and effective assistance of counsel are different..."

Two months later, in conjunction with a motion to suppress hearing, Lawrence called the court's attention to the motion to appoint separate counsel. The trial judge, without conducting a hearing to determine the existence of a conflict, denied the motion.

At trial the other youths testified pursuant to plea bargains that they saw the robbery and shooting, naming Joseph Mar-

shall as the gunman. Joseph Marshall did not take the stand in his own behalf, and neither the state nor the defense called Kevin Marshall as a witness. Defense counsel made at least two objections to the testimony of prosecution witnesses regarding the purported actions and statements of co-defendant Kevin Marshall. At the trial's conclusion, the jury found defendant guilty of first degree murder and, following a penalty hearing, recommended that defendant be sentenced to death. Defendant filed a Motion for a New Trial and Motion in Arrest of Judgement, again raising the claim that the multiple representation of himself and Kevin Marshall by a single appointed attorney over objection violated federal constitutional guarantees of effective assistance of counsel. The trial judge denied the defendant's motions.

On appeal to the Louisiana Supreme Court, the court reversed the conviction and set aside the death sentence basing its decision on the United States Supreme Court's decision in Holloway v. Arkansas, 435 U.S. 475, 95 S.Ct. 1173, 55 L.Ed.2d 426 (1978). The State of Louisiana filed a Motion for Rehearing which was denied summarily by the court on June 18, 1982. From that denial the State of Louisiana through the District Attorney's Office for the Parish of Orleans has applied for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The relationship between joint representation and ineffective assistance of counsel has been thoroughly examined by the United States Supreme Court in its opinions rendered in Holloway v. Arkansas, 435 U.S. 475, 95 S.Ct. 1173, 55 L.Ed. 2d 426 (1978) and Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Holloway, mandates that when counsel providing joint representation moves before trial for the appointment of separate counsel, the trial judge must either grant the request or investigate the risks of multiple representation if there is a possibility of conflict of interests. See also Tague, Multiple Representation and Conflicts of Interest in Criminal Cases, 67 Geo. L.J.

1075(1979). The failure of the trial court to do either is a deprivation of the co-defendant's Sixth Amendment right to the effective assistance of counsel, requiring automatic reversal of any conviction obtained during the forced joint representation, even if the complaining co-defendant fails to show specific prejudice. 435 U.S. at 487-89, 98 S.Ct. at 1180-81, 55 L.Ed. 2d 436-437. In Sullivan, the claim of deprivation of Sixth Amendment right to effective assistance of counsel was a post-conviction allegation. The Supreme Court required that, contrary to Holloway, the defendant in Sullivan must show actual prejudice because of the attorney being forced to represent multiple defendants. 64 L.Ed. 2d at 348.

In the present case, Marshall's attorney voiced his concern of a possible conflict of interest well in advance of trial, and again during trial as well as in post-conviction motions. The requirement of an actual showing of prejudice is unnecessary when the issue is brought to the attention of the court in pre-trial motions and objections. Furthermore, during trial, defense counsel made objections concerning the calling of the defendant's co-defendant, Kevin Marshall, informing the court that he was unable to do so because he represented Kevin Marshall. To call a severed co-defendant as a witness would be to force the attorney to make a decision of which lamb to slaughter by placing the co-defendant at the scene of the crime and subjecting him to cross-examination prior to his trial. Prejudice would arise from forcing the attorney to make these decisions against the interests of each of his clients and would extend to any trial issue, such as identification, being at the scene of the crime, degree of offense, and subjecting a co-defendant to being impeached at his later trial as to the issue of credibility. This conflict is well discussed in NLADA Briefcase, Vol. XXXVI, No. 2, Summer 1979, The Holloway Decision, Impact and Implications, which cites the American Bar Association, Ethical Consideration 5-15 of the Code of Professional Responsibility:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgement may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

Subsequent to the trial of Joseph Marshall, the State reduced the first degree murder charge against Kevin Marshall and allowed him to plead guilty to manlsaughter, a charge not avaliable for plea bargain prior to trial of Joseph Marshall. According to Holloway, the chief evil of joint representation is its compulsion upon the defense lawyer to refrain from action in behalf of a client "not only at trial but also as to possible pretaial plea negotiations and in the sentencing process." 55 L.Ed.2d 438. The decision in Holloway, as distinguished from Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 87 L.Ed. 680 (1942), speaks of placing counsel in a less favorable position to represent the interests of co-defendants, severed or not. The crux of the issue is the forcing of the defendant's attorney to chose between the interests of co-defendants and the failure of the trial court to appoint separate counsel or at least conduct a hearing into the matter. Trial decisions, once made, cannot be resolved by what happened to the severed co-defendant subsequent to trial. At the trial time, the severed co-defendant was facing first degree murder.

Accordingly, the Louisiana Supreme Court has correctly decided this case in light of the decision in Holloway v. Arkansas supra, and recognizing the reasons for the decision in Holloway, respondent urges this Court to deny the petition for writ of certorari to the Louisiana Supreme Court.

CONCLUSION

This case should be controlled by the prior decision of this court in Holloway v. Arkansas, supra, and the judgement below of the Louisiana Supreme Court should be affirmed and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, NOTARY, personally appeared:

JOHN M. LAWRENCE

who after first by me duly sworn did state under oath that:

1. He is the attorney for Joseph Marshall in this matter;
2. On the _____ day of November 1982 a copy of this Brief In Opposition To Writ Of Certiorari To The Louisiana Supreme Court was served on the Office of the District Attorney for the Parish of Orleans by personally delivering a copy to Assistant District Attorney John Craft, 619 S. White Street, New Orleans, Louisiana 70119.

JOHN M. LAWRENCE

SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY, THIS
____ DAY OF NOVEMBER 1982.

NOTARY PUBLIC

FILED
NOV 5 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-294

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

STATE OF LOUISIANA,
Petitioner

versus

JOSEPH MARSHALL,
Respondent

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

COMES NOW the Respondent, Joseph Marshall, through his undersigned counsel, pursuant to Rule 46 of the Supreme Court Rules and asks for leave to file the accompanying Brief In Opposition To Petition For Writ Of Certiorari To The Louisiana Supreme Court in the Supreme Court of the United States without payment of costs, and to proceed in forma pauperis.

Respondent has previously been adjudicated indigent by the Criminal District Court for the Parish of Orleans, Louisiana and his entire case has been by appointment of the Orleans Indigent Defender Program, New Orleans, Louisiana.

Attached hereto is the affidavit required by Rule 46.1 of the Supreme Court Rules.

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MAY 17 1982

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 81-KA-0426

JOSEPH MARSHALL

On Appeal from the Criminal District Court
Parish of Orleans
Honorable Alvin V. Oser, Judge

BLANCHE, Justice.

Defendant, Joseph Marshall, was convicted of first degree murder, a violation of R.S. 14:30. Following the jury's unanimous recommendation of capital punishment, Marshall was sentenced to death. Defendant appeals his conviction and sentence, urging twenty assignments of error. Finding reversible merit as to one of these assignments, we pretermit consideration of the remaining errors assigned by defendant.

Three visitors to the City of New Orleans, Max Minnig, Ray Saunders and Mary Jo Saunders, left their hotel, intending to walk to a nearby restaurant for dinner. When the three got lost in a local housing project, they asked for directions from three youths: Joseph Marshall, Kevin Marshall and James Jones. Though the Marshalls, who are not related, misdirected them, the trio were able to obtain proper instructions from another local resident. The visitors attempted to leave the housing project area when they were overtaken by one of the three youths, who possessed a handgun and demanded money. When Mr. Minnig

Marcus, dissents and assigns reasons
Lemmon, J. dissents and will assign reasons
Watson, J. dissents and assigns reasons.

EXHIBIT "A"

State v Jos. Mars

refused to comply, the gunman pulled the trigger, but the weapon misfired. Minnig then told the assailant to "get out of here", and swung at defendant with his right arm. Defendant pulled the trigger again and, this time, the gun fired, hitting Minnig in the chest. After the victim was shot a second time, another young man appeared. He demanded and received money from Mr. Saunders. He also took the fur cape Mrs. Saunders had been wearing. After the shooting, Joseph Marshall, Kevin Marshall and James Jones ran back into the housing project.

Joseph and Kevin Marshall were both indicted for first degree murder. Defendants pleaded not guilty at their arraignment and the trial court appointed John M. Lawrence of the Orleans Indigent Defender Program to represent both defendants.

Four months before trial, Lawrence moved the trial court to appoint separate counsel for each defendant because, among other reasons, "[t]he interest of each defendant with respect to evidence, presentation of testimony, decision to take the stand or not, the presentation of a defense, accountability and effective assistance of counsel, are different." * * *

Two months later, in conjunction with a motion to suppress hearing, Lawrence called the court's attention to the motion to appoint separate counsel.[1] The trial judge, without conducting a hearing to determine the existence of a conflict, denied the motion.

At trial James Jones testified, pursuant to a plea bargain agreement with the state, that he acted as a lookout

for defendants and witnessed the murder. Jones testified that Joseph Marshall was the gunman and Kevin Marshall the second man.

Joseph Marshall did not take the stand in his own behalf, and neither the state nor the defense called Kevin Marshall as a witness. Defense counsel made at least two objections to the testimony of prosecution witnesses regarding the purported actions and statements of co-defendant Kevin Marshall.[2] At the trial's conclusion, the jury found defendant guilty of first degree murder and, following a penalty hearing, recommended that defendant be sentenced to death. Defendant filed a motion for a new trial and in arrest of judgment, again raising the claim that the multiple representation of himself and Kevin Marshall by a single appointed attorney over objection violated federal constitutional guarantees of effective assistance of counsel. The trial judge denied defendant's motion.

On appeal, defendant argues that the trial court committed reversible error by summarily overruling his pre-trial motion to appoint separate couunsel because of possible conflict of interests. After reviewing the record and the applicable United States Supreme Court decisions, we conclude that we are compelled to reverse defendant's conviction, vacate his sentence and order a new trial.

The relationship between joint representation and ineffective assistance of counsel has been thoroughly examined by the United States Supreme Court in its opinions rendered in Holloway v. Arkansas, 435 U.S. 475, 95 S.Ct.

1173, 55 L.Ed.2d 426 (1978) and Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

In Holloway, a public defender appointed to represent three defendants requested the appointment of separate counsel for each of the defendants three weeks prior to trial. After a hearing, the trial court denied the request. The defendant renewed the motion on the first day of trial, explaining that he could not cross-examine each client in behalf of the other co-defendants. The court again rejected counsel's request.

Because of alleged inconsistencies in the defendants' versions of the events surrounding the crime, the public defender refused to examine any of his clients and, instead, permitted them to testify in narrative form. The United States Supreme Court reversed defendants' convictions, holding that they were deprived of effective assistance of counsel. See Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va.L.Rev. 939 (1978).

Although the Supreme Court declined to adopt a constitutional rule barring joint representation in criminal cases, it overturned the defendants' convictions because counsel's motion, as an officer of the court, "brought home" the "possibility" of a conflict of interest. 435 U.S. at 485, 98 S.Ct. at 1179, 55 L.Ed.2d at 435. According to the majority opinion, the trial court's failure "either to appoint separate counsel or to take adequate steps to ascertain whether the risk [of a conflict of interest] was

too remote to warrant separate counsel" constituted reversible error. 435 U.S. at 484, 98 S.Ct. at 1178-79, 55 L.Ed.2d at 434.

Thus, Holloway mandates that when counsel providing joint representation moves before trial for the appointment of separate counsel, the trial judge must either grant the request or investigate the risks of multiple representation if there is a possibility of conflict of interests. See also Tague, Multiple Representation and Conflicts of Interest in Criminal Cases, 67 Geo.L.J. 1075 (1979). The failure of the trial court to do either is a deprivation of the co-defendants' Sixth Amendment right to the effective assistance of counsel, requiring automatic reversal of any conviction obtained during the forced joint representation, even if the complaining co-defendant fails to show specific prejudice. 435 U.S. at 487-89, 98 S.Ct. at 1180-81, 55 L.Ed.2d at 436-437.

In Sullivan, a co-defendant accepted representation from the two attorneys retained by his two co-defendants. At no time did Sullivan or his lawyers object to the multiple representation. All three defendants were tried separately. Sullivan was the first of the defendants to come to trial. After his conviction, Sullivan moved for post-conviction relief, claiming that he was denied effective assistance of counsel because his attorneys represented conflicting interests.

The Supreme Court dismissed Sullivan's claim that he was deprived of his Sixth Amendment right to effective counsel. In articulating its unwillingness to find merit in

petitioner's post-trial allegations, the high court concluded:

> We hold that the possibility of conflict of interest is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. 64 L.Ed.2d at 348.

Thus, contrary to the accused in Holloway, the defendant in Sullivan was required to show that he was actually prejudiced because of his attorney's multiple representation.

The instant case presents a situation that resembles both Holloway and Sullivan. As in Holloway, Marshall did not retain his counsel, but was represented by a court-appointed attorney. Further, Marshall's attorney voiced his concern of a possible conflict of interest well in advance of trial. Like Sullivan, Marshall was tried separately from his co-defendant and has not shown that he was actually prejudiced because of the joint representation. As a result, the merits of defendant's claim of ineffective counsel, in the present case, depends upon whether Sullivan modified Holloway by requiring defendants to show actual prejudice whenever a co-defendant is tried separately.

After carefully studying the Holloway and Sullivan decisions in pari materia, we conclude that the time at which a concern over the effects of multiple representation was raised was the determinative factor in the high court's apparently conflicting holdings.

When defendant raises a pre-trial objection because of a possible conflict of interest, Holloway requires the trial court to appoint separate counsel or take adequate steps to determine if the claimed risk is too remote. Failure to take either action warrants automatic reversal, even in the absence of specific prejudice. However, should the objection to multiple representation be made after trial, Sullivan is controlling and the defendant must show actual prejudice in support of his claim.

We recognize that the severance granted by the trial judge, in the instant case, made it highly unlikely that any conflict of interest could arise which would have inhibited counsel's representation at trial. The severance placed counsel in a more favorable position because of the knowledge he would gain through his representation of all defendants. As noted by Justice Frankfurter in his dissent in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 87 L.Ed. 680 (1942), "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."

Even so, Holloway did not expressly or impliedly limit its holding to multiple representation of co-defendants who are jointly tried. The presumed prejudice warranting automatic reversal arises before trial when the trial judge fails to either appoint separate counsel or to inquire into the matter adequately in response to a timely pretrial motion. According to Holloway, the chief evil of joint representation is its compulsion upon the defense lawyer to refrain from action in behalf of a client "not

only at trial but also as to possible pretrial plea negotiations and in the sentencing process." 55 L.Ed.2d at 438.

Though a severance was granted by the trial judge in Sullivan, it was not the crucial factor in the court's decision to require a defendant to show actual prejudice. As stated by the majority:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. (emphasis added) 64 L.Ed.2d at 346.

Further, in addressing defendant's claim that he was denied effective representation of counsel, the Sullivan court noted that the claim raised issues "expressly reserved" in Holloway. Thus, it is clear that the high court's opinion in Sullivan did not limit or modify its holding in Holloway concerning pre-trial objections related to multiple representation.

Because defendant was the trigger man, it is almost impossible to conceive what pretrial advantage counsel would have lost for defendant by virtue of his representation of others. Nevertheless, the "high court", as this Court reads Holloway, has practically denied a trial judge any discretion when counsel, before trial, asserts a claim of conflict of interest except to appoint other counsel.

Accordingly, we conclude that the United States Supreme Court decision in Holloway v. Arkansas, supra, is

controlling and compels us to reverse defendant's conviction, vacate his sentence, and order a new trial.[3]

REVERSED AND REMANDED.

• • •

FOOTNOTES

[1] "I would like to comment briefly. I filed a Motion to have separate counsel appointed for each defendant under Holly v. Arkansas [sic]. Since I have statements made by both defendants we may have a problem as to how I will proceed with the defense when people are making statements against each other and against the interests of each other."

At a later hearing concerning a bail reduction and a motion to suppress, counsel reasserted his request that the court appoint separate counsel:

"The identification procedures here are such that I cannot call the co-arrestee or co-defendant since I also represent him and the source of this information leading to the arrest of Joseph Marshall is Kevin Marshall and being his counsel I cannot call him."

[2] During the testimony of one of the prosecution's witnesses, defense counsel moved for a mistrial, stating: "I object to any testimony about Kevin because I represent Kevin Marshall and I cannot call him in this matter. I move for a mistrial." The motion was denied.

[3] The defendant objected to certain comments made by the prosecutor during the sentencing hearing. The prosecutor's comments included a reference to automatic review of the propriety of the death penalty by this Court and the assertion that "somewhere down the line a Governor can sign a piece of paper and release Joseph Marshall back on an unsuspecting world." For purposes of the defendant's retrial, we refer the prosecutor to this Court's opinions in which death sentences were set aside because of such improper arguments. State v. Willie, ____ So.2d ____ (La. 1981), No. 81-KA-0242; and State v. Lindsey, 404 So.2d 466 (La. 1981). The prosecutor also characterized the defendant as an "animal" , an epithet which we have previously warned may constitute reversible error. State v. Grey, 351 So.2d 448 (La. 1977).

SUPREME COURT OF LOUISIANA

NO. 81-KA-0426

STATE OF LOUISIANA

VERSUS

JOSEPH MARSHALL

WATSON, Justice, dissenting.

It is indeed difficult to understand why the trial court would not appoint separate counsel under the circumstances presented in this case. However, I disagree with the majority holding that prejudice is presumed. Before reversing the conviction, it is necessary to find prejudice to defendant's rights resulting from the failure to appoint separate counsel.

I reserve judgment on the question of the sentence, but I would affirm the conviction.

Therefore, I respectfully dissent.